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In the Supreme Court of the United States

OCTOBER TERM, 1978

GTE SYLVANIA, INCORPORATED, ET AL., PETITIONERS

v.

CONSUMERS UNION OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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OPINIONS BELOW

The opinion of the court of appeals (A. 63-86) is reported at 590 F.2d 1209. The initial opinion of the court of appeals (A. 34-49), which this Court vacated (see 434 U.S. 1030), is reported at 561 F.2d 349. The opinion of the district court (A. 21-31) is reported at 400 F. Supp. 848.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1978. The petition for a writ of

certiorari was filed on February 12, 1979, and was granted on May 14, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioners, who had submitted accident reports to the Consumer Product Safety Commission under claims of confidentiality, filed suits consolidated in the United States District Court for the District of Delaware to enjoin the Commission from disclosing those reports to respondent Consumers Union and others who had requested disclosure under the Freedom of Information Act. The district court issued a permanent injunction prohibiting disclosure of the reports. While the Delaware litigation was pending, respondents Consumers Union and Public Citizen's Health Research Group brought this action in the United States District Court for the District of Columbia to compel disclosure of the reports under the FOIA. The question presented is:

Whether the court of appeals erred in directing the United States District Court for the District of Columbia to adjudicate this case.

STATUTE INVOLVED

The Freedom of Information Act, 5 U.S.C. 552 (a)(4)(B), provides in pertinent part:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

STATEMENT

In May 1974, the Consumer Product Safety Commission obtained from petitioners, who are television manufacturers (sometimes referred to hereafter as the "manufacturers" or "submitters"), reports of television-related accidents (*e.g.*, fires, electric shocks, etc.), partly through requests and partly through subpoenas issued under 15 U.S.C. 2076(b)(3). Claims of confidentiality accompanied the information submitted by most of the manufacturers (A. 36-37).

One month later, respondents Consumers Union of the United States, Inc., and Public Citizen's Health Research Group [1] (sometimes referred to hereafter collectively as "Consumers Union" or the "requesters") requested the Commission to disclose the reports under the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"). Consumers Union subsequently excluded from its request information protected by the attorney-client privilege and the work-product doctrine and the names and addresses of accident victims (A. 38).

The Commission disclosed portions of the reports as to which no claim of confidentiality had been made;

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[1] Respondents Consumers Union and Public Citizen's Health Research Group are nonprofit organizations. Consumers Union was organized under the laws of the State of New York to provide information on consumer goods and services, and it has several hundred thousand members (A. 15-16).

with respect to the rest, it directed the manufacturers to substantiate their claims of confidentiality. On April 8, 1975, after further communication with the manufacturers and the requesters, the Commission informed the parties of its legal determination that the requested reports were not exempt from mandatory disclosure under the FOIA and that, even if they were exempt from mandatory disclosure, the Commission would exercise its discretion to release them on May 1, 1975 (A. 18, 37-38).[2]

In April and May 1975, petitioners filed "reverse-FOIA" suits[3] in the United States District Court for the District of Delaware and in certain other federal courts, seeking to enjoin the Commission from disclosing the reports. Petitioners contended that disclosure was prohibited by Section 6 of the Consumer Product Safety Act (15 U.S.C. 2055), by exemptions to the FOIA, and by the Trade Secrets Act (18 U.S.C. 1905). Thereafter, all of petitioners' suits were consolidated in the district court in Delaware (A. 39),

[2] The Commission concluded that "[t]he release of the accident data would assist consumers to better evaluate the safety of TVs." See *GTE Sylvania, Inc.* v. *CPSC*, No. 78-1328 (3d Cir. Apr. 30, 1979), slip op. 13.

[3] For convenience, we refer in this brief to actions brought against agencies to enjoin disclosure of information by the commonly used term "reverse-FOIA" actions. Technically that is a misnomer, because, as the Court held in *Chrysler Corp.* v. *Brown*, No. 77-922 (Apr. 18, 1979), FOIA is solely a disclosure statute and provides no legal basis for actions seeking to prevent disclosure; such actions must find a basis in other statutes.

and that court issued a series of temporary restraining orders and (in October 1975) a preliminary injunction prohibiting the Commission from releasing the documents pending the litigation (Pet. App. A71-A107).[4]

In the meantime, on May 5, 1975, after petitioners' suits had been filed, Consumers Union and the other requesters instituted this action against the Commission, certain of its members and employees, and petitioners in the United States District Court for the District of Columbia, contending that the FOIA compelled disclosure of the television-related accident reports (A. 14-20).

In September 1975, the district court in the District of Columbia dismissed the requesters' complaint. The court concluded that, in view of the fact that both the requesters and the Commission favored release of the reports, there was no case or controversy, and it therefore lacked jurisdiction (A. 21-31).[5] The court noted that the requesters had declined to intervene in the pending Delaware proceedings and stated that it "in no way intends to prejudice any future efforts plaintiffs might make to intervene in the Delaware proceeding" (A. 31). The requesters, however, did not seek to intervene in the Delaware case

[4] The Commission filed a notice of appeal of the preliminary injunction, but it subsequently moved to dismiss the appeal (A. 40).

[5] The court also dismissed the complaint to the extent it sought relief against the submitters on the ground that they did not have custody of the documents in question and therefore that no relief could be granted against them (A. 29-30).

(and have never done so); instead, they appealed the dismissal of their complaint to the United States Court of Appeals for the District of Columbia Circuit.

In July 1977, the District of Columbia Circuit reversed the dismissal of the requesters' FOIA suit (A. 34-49). The court of appeals held first that there was a case or controversy sufficient to satisfy the jurisdictional requirements of Article III—namely, a controversy between the requesters and the Commission as to whether the orders entered in the Delaware case barred the District of Columbia district court from granting relief to the requesters (A. 42-44). Second, the court of appeals held that the pendency of the Delaware proceedings did not prevent the District of Columbia district court from adjudicating the merits of the requesters' FOIA claims because, the court of appeals believed, the Delaware proceedings had terminated. The court also explained its decision by questioning the vigor and sincerity with which the Commission had opposed the manufacturers' suit in Delaware (A. 45-48). The court of appeals therefore remanded the case to the district court with instructions to consider the merits of the requesters' claims (A. 48-49).[6]

[6] After the District of Columbia Circuit's decision, the Commission moved the Delaware district court to transfer the submitters' suits to the District of Columbia district court pursuant to 28 U.S.C. 1404 (Pet. App. A110). The Delaware court denied the motion on the ground that the suits before it were in an advanced stage of litigation and that transfer would unduly delay a determination on the merits (*id.* at A109-A117).

The manufacturers then filed a petition for a writ of certiorari (No. 77-508). On December 8, 1977, while the petition was pending, the Delaware district court entered a final decision on the merits permanently enjoining the Commission from disclosing the documents (Pet. App. A118-A141). On January 16, 1978, in view of this development, this Court granted the manufacturers' certiorari petition, vacated the judgment of the District of Columbia Circuit, and remanded the case to the court of appeals "for further consideration in light of the permanent injunction entered by the United States District Court for the District of Delaware" (434 U.S. 1030).

On remand, the court of appeals ruled that the existence of a permanent injunction in Delaware did not alter its view that a Freedom of Information Act requester, not a party to the Delaware suit, is not barred from litigating its right to the documents in a second forum (A. 63-86). The court reaffirmed its position that a case or controversy exists (*id.* at A. 72) and held that the traditional anti-relitigation bars —stare decisis, collateral estoppel and comity—are inapplicable (A. 73-78). The court below recognized that its holding might effectively nullify any judgment by another court in favor of a "reverse-FOIA" plaintiff, but the court believed that this result could be avoided if the FOIA requester were joined as a defendant in the "reverse-FOIA" lawsuit. The court also suggested that creation of a defendant class made up of all future requesters might solve the problems facing "reverse-FOIA" plaintiffs (A. 79).

With respect to the Commission's concern that litigation of the case in two forums might subject it to inconsistent decrees, the court asserted that there were procedural devices that the Commission could have used to avoid that possibility. In particular, the court observed that the government could have moved to join the requesters under Fed. R. Civ. P. 19 (A. 80-82). The court of appeals thus ordered, for a second time, that the district court proceed with the case on its merits (A. 85-86).

The manufacturers again petitioned this Court for a writ of certiorari. On April 30, 1979, while the petition was pending, the United States Court of Appeals for the Third Circuit affirmed the permanent injunction issued by the Delaware district court, holding that Section 6 of the Consumer Product Safety Act (15 U.S.C. 2055) is a withholding statute within Exemption 3 of the FOIA (5 U.S.C. 552(b)(3)) and that it prohibits disclosure of the accident reports in the circumstances of this case. *GTE Sylvania, Inc.* v. *CPSC*, No. 78-1328.

SUMMARY OF ARGUMENT

I.

The court of appeals' judgment directing the district court to adjudicate this Freedom of Information Act suit is contrary to a specific provision of FOIA, which states that district courts shall have jurisdiction under the Act to order federal agencies to disclose information "improperly withheld from the complainant." 5 U.S.C. 552(a)(4)(B). An

agency's refusal to release documents in obedience to an injunction of a federal court of competent jurisdiction can in no sense be regarded as "improper" within the meaning of Section 552(a)(4)(B). A party is required to obey an injunction regardless of whether or not he believes it was correctly entered or whether it is later set aside on appeal. See, *e.g.*, *Walker* v. *Birmingham*, 388 U.S. 307 (1967).

Moreover, no purpose of FOIA would be served by permitting one federal court to order an agency to violate the non-disclosure order of another federal court. The central purpose of FOIA was to circumscribe the discretion that agencies had previously exercised in deciding whether to disclose or withhold information from the public. See *Chrysler Corp.* v. *Brown*, No. 77-922 (Apr. 18, 1979), slip op. 8-10; *EPA* v. *Mink*, 410 U.S. 73, 79 (1973). When an agency has been enjoined from divulging information on the ground that release is expressly prohibited by statute, it has no further discretion or control over the matter.

II.

The court of appeals' judgment is also contrary to basic principles of judicial comity. The general rule is that courts should refrain from duplicating or interfering with the proceedings and decrees of other courts with prior jurisdiction over the subject matter. This rule is based on considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposi-

tion of litigation" (*Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952), and the desire to "avoid unseemly and disastrous conflicts in the administration of our * * * judicial system * * * and to protect the judicial processes of the court first assuming jurisdiction * * *." *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935).

These important considerations apply with full force in this case. It makes no sense to require the district court in the District of Columbia to adjudicate the same controversy, involving the same documents and the same legal issues, that has already been litigated in the Delaware district court. The upshot of the District of Columbia proceedings will either be an order agreeing with the Delaware court, in which event there will have been a senseless duplication of effort, or an order requiring the Commission to disobey the Delaware court's injunction, in which event this Court's review would be necessary to resolve the unseemly conflict. Indeed, application of the comity principle is particularly appropriate here, because the requesters have never offered any persuasive reason why they could not have asserted and protected their interests by intervening in the Delaware proceeding, as the District of Columbia district court suggested at the outset.

III.

None of the arguments offered by the court of appeals supports its sanctioning of duplicative and possibly conflicting litigation.

A. The court of appeals erred in concluding that principles of comity have no application to lawsuits subsequently brought by non-parties to a prior action. No decision of this Court supports that view. Although principles of collateral estoppel may not apply with full force to strangers to a prior action, the question in this case is not whether the requesters are foreclosed by the Delaware proceedings and decrees from obtaining an adjudication of their own rights under FOIA, but in what court and at what time they should do so. That question is governed by considerations of sound judicial administration, and this Court's rulings have established that those considerations are applicable to suits by strangers to the prior litigation. See *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, *supra*.

Although *Penn Central* and several other decisions involving non-parties to a prior action concerned *in rem* or quasi-*in rem* jurisdiction, the Court's reasoning fits this case as well. As the court of appeals recognized, actions seeking to require or prohibit the disclosure of specified information are closely analogous to actions contesting the appropriate disposition of specified property; in either class of cases, exclusive control over the subject matter is essential to the effectuation of a court's judgment.

B. Neither is there merit to the court of appeals' view that a departure from the normal rules of comity and sound judicial administration is warranted by the need to provide adequate protection to the interests and statutory rights of FOIA requesters. The

court's concern that "reverse-FOIA" plaintiffs might otherwise file preemptive suits in "sympathetic" forums is, as this Court stated in *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, *supra*, in rejecting the same argument, "hardly a worthy or wise basis for fashioning rules of procedure" (342 U.S. at 185). By the same token, the court's assertion that an agency defending a "reverse-FOIA" action would not present an adequate defense or adequately represent the interests of requestors is unjustified in general and is certainly unsubstantiated by any evidence in this record. Moreover, even if valid in occasional instances, this attack on agency integrity overlooks the fact that requesters may always intervene to represent their own interests in the submitters' action.

There is also no basis for the court's further conclusion that the venue provisions of FOIA reflect a legislative policy in favor of litigating controversies over the disclosure of information in forums convenient to requesters. "Reverse-FOIA" suits are based on other federal statutes (and are brought under venue provisions pertinent to them) allegedly reflecting a paramount legislative policy against disclosure. There is no reason to assume *a priori*—*i.e.*, prior to a judicial resolution of the conflicting claims —that Congress always favors venue for such controversies in courts chosen by the party relying on FOIA. Indeed, because FOIA exempts from mandatory disclosure matters that are "specifically exempted from disclosure by [another] statute" (5 U.S.C. 552(b)(3)), any assumption should be to the contrary.

C. Finally, the court of appeals was incorrect in concluding that the availability to parties in a "reverse-FOIA" action of procedural devices such as joinder of FOIA requesters under Fed. R. Civ. P. 19 should allow the requesters in this case—who assiduously avoided participating in the Delaware action for strategic reasons—to bring a parallel lawsuit in another forum and perhaps to obtain an order requiring the federal agency to disobey the decree of the first court.

Even if the parties to the "reverse-FOIA" action could or should have sought to use the procedural devices identified by the court of appeals, the requesters still have no legal claim under FOIA at this stage, since the Delaware court's injunction is valid and binding, and the agency's compliance with it cannot be labeled as "improper." In any event, whether the use of such devices in a "reverse-FOIA" suit is necessary or proper is a matter that should be decided by the courts directly involved with and most knowledgeable about that litigation—here, the district court in Delaware and the Third Circuit—not by a court sitting elsewhere.

Moreover, while devices such as joinder may be appropriate and desirable in some instances, they may not be in others—for example, where joinder of requesters would be inconvenient or impossible and transfer of the action to another venue would be unfair to the submitters. There is thus no basis for the court of appeals' unyielding rule that joinder of requesters is the required course for "reverse-FOIA"

plaintiffs generally and that a second court may adjudicate the identical legal issue litigated earlier whenever it concludes that the first forum should either have joined all known FOIA requesters or dismissed the action before it.

ARGUMENT

THE COURT OF APPEALS ERRED IN DIRECTING THE DISTRICT COURT TO ADJUDICATE THIS CASE

For the second time the court of appeals has directed the district court to proceed with the adjudication of this case, notwithstanding the pendency of a proceeding involving the identical subject matter in a district court in another circuit with prior jurisdiction over the matter and notwithstanding orders by the latter court (since affirmed by the United States Court of Appeals for the Third Circuit) prohibiting the Commission from disclosing the documents that are at issue. Although the government disagrees on the merits with the decisions of the Delaware district court and the Third Circuit and has been litigating those legal questions against petitioners for four years, we agree with petitioners that the court below has again erred in ordering the District of Columbia district court to adjudicate essentially the same controversy, with the same documents and the same issues, as that involved in Delaware.

Our submission rests on two related considerations. First, adjudication of this case by the District of Columbia district court would be contrary to a specific provision of the Freedom of Information Act, which authorizes federal courts to order disclosure only of information "improperly withheld" (5 U.S.C. 552(a)(4)(B)). An agency's withholding of documents in obedience to the orders of another federal court of competent jurisdiction is plainly not "improper." Second, adjudication of this case by the District of Columbia district court would be contrary to elementary principles of judicial comity—principles that may be regarded as reflected in Section 552(a)(4)(B).

I. The Freedom of Information Act Precludes One Federal Court from Ordering A Federal Agency to Disclose Information That Another Federal Court Has Enjoined That Agency From Disclosing

The Freedom of Information Act, 5 U.S.C. 552, provides that each federal agency "shall make available to the public" certain information, including "records" held by the agency (5 U.S.C. 552(a)(3)), and establishes procedures for making such information available. The Act also establishes nine categories of information to which FOIA and its mandatory disclosure requirements do not apply. 5 U.S.C. 552(b). The district courts are given jurisdiction to enjoin an agency from refusing to provide records sought under the Act, but only if the records are "improperly withheld." 5 U.S.C. 552(a)(4)(B) provides in pertinent part (emphasis supplied):

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or

> in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records *improperly withheld* from the complainant.

See *Federal Open Market Committee* v. *Merrill*, No. 77-1387 (June 28, 1979), slip op. 11.

Under Section 552(a)(4)(B), we submit, a district court has no authority to order an agency to disclose records that another federal court of competent jurisdiction has enjoined the agency from divulging. That is so because the agency's obedience to a federal court order can in no sense be regarded as "improper." Disobedience of such an order would be a contempt of court. Indeed, it is well established that a party who is restrained by a court order must obey it, and may be punished for violating it, even if the order is ultimately held invalid. See *Walker* v. *Birmingham*, 388 U.S. 307 (1967); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 439 (1976).[7]

[7] Here, as in *Walker* v. *Birmingham*, *supra*, the "court that issued the injunction had, as a court of equity, jurisdiction over the [parties] and over the subject matter of the controversy. And this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity." 388 U.S. at 315 (footnote omitted). Although the requesters have argued, in this case and as amici curiae in the Third Circuit, that the Delaware suit should have been dismissed for failure to join them as allegedly indispensable parties—a contention with which we disagree (see pages 43-44, *infra*) and that the Third Circuit has rejected (see *GTE Sylvania, Inc.* v. *CPSC*, No. 78-1328 (Apr. 30, 1979) slip op. 20-22—they have never suggested that the Delaware district court lacked jurisdiction to issue its temporary restraining orders and ultimately its permanent injunction, or that the Commission was somehow excused from obeying those orders, or that the rejection of their joinder argument made those orders "transparently invalid."

The conclusion that FOIA does not authorize one district court to compel a federal agency to disobey the nondisclosure orders of another federal court is supported by the basic purpose as well as the language of the Act. As this Court has recognized, most recently in *Chrysler Corp.* v. *Brown*, No. 77-922 (Apr. 18, 1979), slip op. 6-10, the primary objective of FOIA was to circumscribe the discretion that federal agencies had previously exercised under the Administrative Procedure Act to withhold information from the public. See also *EPA* v. *Mink*, 410 U.S. 73, 79 (1973); S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6 (1966). To that end, FOIA limited agencies' discretion to withhold information to nine carefully defined and exclusive categories and subjected their decisions to judicial scrutiny. *EPA* v. *Mink*, *supra*, 410 U.S. at 79. But when an agency has no discretion or control over the matter of disclosure because it has been prohibited from releasing the information by a court of competent jurisdiction, no purpose of the Act would be served by authorizing or requiring another court to order disclosure.

Although petitioners and the Commission argued this point to the court of appeals,[8] the court's opinion

[8] Br. for the Federal Appellees (May 1976) at 7 n.2; Memorandum for the Federal Appellees (Sept. 1978) at 3-5.

To our knowledge, only one other court has suggested that under FOIA one federal court may order the disclosure of

does not address it. We view this as an indication that the court rejected our submission. For the reasons we have stated, this was error.

II. The Court Of Appeals' Ruling Is Contrary To Settled Principles of Judicial Comity

By directing the district court in the District of Columbia to adjudicate a controversy that is the subject of litigation in another federal court with prior jurisdiction, the court of appeals violated not only the express terms of 5 U.S.C. 552(a)(4)(B) but also basic principles of judicial comity. This Court has often recognized the general rule that a federal court should refrain from duplicating or interfering with the proceedings and decrees of another federal court with prior jurisdiction over the subject matter. See *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817 (1976); *Kerotest Mfg.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952); *Steelman* v. *All Continent Corp.*, 301 U.S. 278 (1937). As the court of appeals stated in *Carbide & Carbon Chem. Corp.* v. *United States Industrial Chem., Inc.*, 140 F.2d 47, 49 (4th Cir. 1944): "Ordinarily, the court first acquiring jur-

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information that another federal court has prohibited. *Robertson* v. *Department of Defense*, 402 F. Supp. 1342, 1345-1347 (D.D.C. 1975). That suggestion is incorrect for the reasons we have stated, and it appears to have been dictum in any event, since the decision only rejected some of the claims of the submitters for opposing disclosure and granted partial summary judgment for the requester without ordering disclosure. *Id.* at 1349.

isdiction of a controversy should be allowed to proceed with it without interference from other courts."

This basic principle of judicial comity rests on considerations of

> "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952). * * * As between federal district courts * * * though no precise rule has evolved, the general principle is to avoid duplicative litigation.

Colorado River Water Conservation District v. *United States*, *supra*, 424 U.S. at 817. Indeed, with respect to *in rem* or quasi-*in rem* actions (to which the court of appeals correctly analogized the action in this case (A. 72, 80)), this Court's decisions have occasionally characterized the principle in terms of a preclusion of jurisdiction (rather than a discretionary abstention) on the part of courts in which suits involving the same property are subsequently filed. Thus, in *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935), the Court remarked:

> [I]f the two suits are *in rem* or quasi *in rem*, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. To avoid unseemly and disastrous conflicts in the administration of our

> dual judicial system, * * * and to protect the judicial processes of the court first assuming jurisdiction, * * * the principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other.

Whether the general rule rests on considerations of sound judicial administration or on jurisdictional limitations, it should apply in this case. In our view it makes no sense to require the district court in the District of Columbia to adjudicate the same issues, involving the same materials, that have been fully and fairly adjudicated by the district court in Delaware and now by the Third Circuit.[9] The only result of that effort would be either that the courts in the District of Columbia would eventually agree with the Third Circuit on the merits, thus producing wasteful and unnecessary litigation, or that the courts in the two

[9] There can be no dispute, we submit, that the two proceedings involve the same controversy. Petitioners' suits in Delaware present the question whether the Commission is prohibited from disclosing the television accident reports by Section 6(b)(1) of the Consumer Product Safety Act (15 U.S.C. 2055(b)(1)) and Exemption 3 of the FOIA (5 U.S.C. 552(b)(3)), while the requesters' suit in the District of Columbia involves the question whether the Commission is required to disclose the identical reports by 5 U.S.C. 552(a)(3). Hence, the question presented in the Delaware suit is subsumed within and controls the question presented in the District of Columbia suit. Obviously, a decision that the Commission is absolutely barred from disclosing the reports by statute is conclusive of the question whether the Commission must disclose the reports to the requesters under the FOIA.

circuits would disagree, thus subjecting the Commission to conflicting orders from which only this Court's review could extricate it. Here, as in *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, *supra*, 294 U.S. at 195, adherence to the principle of comity is necessary "[t]o avoid unseemly and disastrous conflicts in the administration of our * * * judicial system * * * and to protect the judicial processes of the court first assuming jurisdiction * * *."[10]

[10] Moreover, a holding that the District of Columbia district court should proceed to adjudicate this case would have anomalous results, because in that litigation both the plaintiff requesters and the defendant Commission would be contending on the merits that the reports may and should be disclosed. It was for that reason that the District of Columbia district court concluded that it lacked jurisdiction because there was no case or controversy (A. 25-30).

In both of its decisions the court of appeals held that there was a controversy between the requesters and the Commission sufficient to establish Article III jurisdiction—namely, the dispute over whether the proceedings before and orders of the Delaware district court precluded the District of Columbia district court from adjudicating the case and granting the requested relief (A. 42, 72). Although we originally argued to the contrary, on further reflection we have become persuaded (as we noted in our briefs in response to petitioners' two petitions for a writ of certiorari) that the court of appeals is correct on this point. There was and is a controversy between the requesters and the Commission concerning the effect of the Delaware proceedings sufficient to confer Article III jurisdiction.

However, if this Court were to affirm the decision of the court of appeals that the FOIA litigation instituted by the requesters in the District of Columbia district court must proceed and that that court may grant the requested relief notwithstanding the Delaware injunction, the only remaining issue on remand to the district court would be whether the Commission may and should disclose the reports to the re-

Indeed, application of the principle of comity and avoidance of duplicative litigation is particularly appropriate in this case because the requesters have never offered any substantial or persuasive reason why they could not have adequately asserted and protected their interests by intervening in the Delaware proceeding, as the District of Columbia district court strongly suggested nearly four years ago in dismissing their complaint (A. 31). Although respondents appeared as amici curiae in the Third Circuit to contend that the Delaware action should have been dismissed because of the failure to join them under Fed.R.Civ.P. 19, the Third Circuit, in rejecting that contention, stated (*GTE Sylvania, Inc.* v. *CPSC*, *supra*, slip op. 21):

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questers—an issue (as noted above) on which both parties to the lawsuit agree.

Whether or not such agreement between the parties on the only remaining issue in the case would present a sufficient case or controversy to satisfy Article III jurisdiction is an arguable question. We believe that it would. When litigation presents a controversy between the parties on some controlling issues of law or fact, but the parties agree on other issues of law or fact, a court before final judgment may resolve the disputed issues. The fact that only undisputed issues remain does not deprive the court of jurisdiction to decide the case and to enter a final judgment, although it may mean that judgment will be rendered more quickly. Nevertheless, the litigation that the court of appeals has directed would lack to a substantial extent the "concrete adverseness which sharpens the presentation of issues" (*Baker* v. *Carr*, 369 U.S. 186, 204 (1962)), and the anomaly of that result further supports our submission that the general principle of comity should apply in this case.

> [W]e also note that [the requesters] had adequate notice of this action prior to commencing their own lawsuit and that they could have intervened in the Delaware litigation without significant burden. Amici concede that their decision not to intervene was based on a desire to present their case in a forum that was more convenient and perceived as less hostile to their interests.

This is consistent with the Delaware district court's finding that "[t]he FOIA requesters, although aware of the earlier filed Delaware cases, did not seek to intervene in the instant cases but for 'strategic reasons' filed the D.C. suit instead" (Pet. App. A112 n.9). We can imagine no sound reason for departing from principles designed to foster efficient judicial administration simply to accommodate the forum preferences and litigation strategies of interested non-parties.[11]

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[11] The court below, in concluding that the requesters' failure to intervene in Delaware did not preclude the maintenance of their suit (A. 84-85), stated, among other things, that "[p]reclusion based on the failure to intervene would be proper, if at all, only where the putative intervenor had timely notice of the litigation" (A. 84 n.64). If this statement indicates the court's view that the requesters in this case lacked adequate notice of the Delaware proceedings, it is plainly incorrect. There is no dispute that the requesters knew of the Delaware litigation from the outset and had ample time prior to final judgment to intervene in that case and to have their claims adjudicated. In fact, in appropriate, though rare, cases, a non-party has been allowed to intervene even after final judgment and while the case is on appeal (see *Atkins* v. *State Board of Education*, 418 F.2d 874 (4th Cir. 1969)) or on petition for certiorari (see *Hunter* v. *Ohio ex rel. Miller*, 396 U.S. 879 (1969)).

As we now discuss, none of the reasons advanced by the court of appeals supports its rejection of the general rule of comity in this case.

III. None of the Arguments Offered By the Court of Appeals Justifies Its Conclusion That the District of Columbia District Court Should Adjudicate This Controversy

The court of appeals readily acknowledged that its decision would require duplicative litigation of issues that have already been decided in proceedings in the Delaware district court and the Third Circuit and that the resulting relitigation might well subject the Commission to inconsistent decrees (A. 78-79). The court offered several arguments in an effort to justify that unpalatable result and to reject the principle of comity in the circumstances of this case. None of these arguments withstands analysis.

A. *Principles of Comity Apply to Subsequent Suits Brought By Non-parties to the Original Suit*

The court of appeals concluded, first, that principles of judicial comity do not apply to lawsuits brought by persons who were not parties to the original action (A. 77-78). Nothing in this Court's decisions suggests any such limitation on these principles. Rather, the Court has emphasized that rules of comity rest on considerations of "[w]ise judicial administration, * * * conservation of judicial resources and comprehensive disposition of litigation" (*Kerotest Mfg. Co.* v. *C-O-Two Fire Extinguisher Co.*, *supra*, 342 U.S. at 183)—considerations that do not depend upon the

identity of the parties concerned. Perhaps more important in this context, these principles also rest on the need "[t]o avoid unseemly and disastrous conflicts in the administration of our * * * judicial system * * * and to protect the judicial processes of the court first assuming jurisdiction." *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, *supra*, 294 U.S. at 195.

It is of course true that ordinarily a person may not be bound by a judgment rendered in an action to which he was not a party or in privity with a party and that a non-party may subsequently institute his own action even when the relief he seeks would be logically inconsistent with the prior judgment. See, *e.g.*, *Montana* v. *United States*, No. 77-1134 (Feb. 22, 1979); *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 593 (1974); *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 329 (1971); Note, *Collateral Estoppel of Non-Parties*, 87 Harv. L. Rev. 1485, 1500 (1974). But this limitation on the doctrine of collateral estoppel, grounded in notions of due process, establishes only that non-parties cannot be denied the right to litigate on their own behalf in some appropriate forum. It does not prescribe the particular forum, or procedure, or time, in or by which those rights must be adjudicated, which are questions governed by other rules and principles (such as comity) necessary to any system of orderly disputes resolution.

No one has contended that the requesters could not assert and obtain an adjudication of their own

rights. They could certainly have intervened in the Delaware actions before judgment, since they had ample notice of those proceedings.[12] Moreover, as a general matter we believe that requesters who were not parties to a "reverse-FOIA" action and who are not foreclosed by rules of collateral estoppel may request the "reverse-FOIA" court to modify its injunction prohibiting disclosure when that injunction allegedly impairs their own legal rights and when, as a practical matter, they have no other avenue of relief. See *Deposit Bank* v. *Frankfort*, 191 U.S. 499, 512 (1903); *Lapin* v. *Shulton, Inc.*, 333 F.2d 169 (9th Cir. 1964) (holding that only the issuing court may modify its injunction).[13] But

[12] Indeed, the requesters unquestionably were entitled to assert their FOIA claims by instituting this action in the District of Columbia district court. See 5 U.S.C. 552(a)(4)(B). The fact that legal rules of general application—here, principles of comity and FOIA's limitation of injunctive relief to situations in which agency records are "improperly withheld from the complainant"—dictate that the requesters not prevail in this case does not mean that they have been deprived of an opportunity to assert their rights because of proceedings in another case to which they were not a party.

[13] Whether the requesters in this case or future requesters could obtain a post-judgment adjudication of their rights in the Delaware district court is not presented in this case, because no requester has sought such relief in that court. Fed. R. Civ. P. 60(b)(5) and (6), allowing motions for modification of a judgment where application of the judgment "is no longer equitable" or "for any other reason justifying relief," refers only to motions by parties. But general principles of equity and due process should permit a non-party not bound by collateral estoppel the same access in cases where an injunction allegedly impairs his legal rights and where, as a practical matter, he has no other adequate remedy. Cf. *System Federation No. 91* v. *Wright*, 364 U.S. 642, 646-647 (1961); *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932). Furthermore, a non-party always may seek to intervene for the purpose of moving under Rule 60(b) to modify the judgment. See Fed. R. Civ. P. 24(a)(2).

Although this question is not directly presented here, petitioners have presented a related question, claiming that at least Consumers Union, and perhaps other requesters as yet unknown, are collaterally estopped from relitigating the merits of the Delaware decree, either in Delaware or in any other forum. Petitioners rely on dictum in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 114 (1968), stating that a non-party might "be bound by the previous decision because, although technically a non-party, he had purposely bypassed an adequate opportunity to intervene." They also rely on cases suggesting that in some circumstances non-parties are bound by judgments in cases in which the government has sought to vindicate a public interest, on the theory that the government acted as an adequate representative of all private non-parties. *Southwest Airlines Co.* v. *Texas International Airlines*, 546 F.2d 84 (5th Cir.), cert. denied, 434 U.S. 832 (1977).

We do not address those contentions because they turn on the particular facts of this case concerning the motives and opportunities of Consumers Union and because those facts have not been fully developed or resolved in this record. Furthermore, we believe it is unnecessary to decide whether Consumers Union or other potential requesters are forever barred from seeking to assert their claims under FOIA in the Delaware district court in order to conclude that it was error for the court below to direct parallel litigation in the District of Columbia.

established principles of comity and sound judicial administration require requesters to pursue their rights in that forum and by those means; they should not be allowed to seek an injunction in some other forum that would effectively nullify and create an irreconcilable conflict with an injunction already in existence.

This Court's decision in *Penn General Casualty Co.* demonstrates that principles of comity apply to actions subsequently brought by non-parties to the first action and strongly supports our view that those principles foreclose parallel litigation of this controversy in the District of Columbia. The court in that case invoked considerations of sound judicial administration to prohibit a non-party to a lawsuit from maintaining a subsequent suit in another forum involving the same *res*. Although the Court's opinion articulated the controlling principles with reference to *in rem* and quasi *in rem* proceedings, we believe that the same considerations apply with equal force here.[14] As the court of appeals correctly observed (A. 72, 80), actions seeking to require or prohibit the disclosure of copies of specified documents are in many ways indistinguishable from actions seeking the particular disposition of specified property.[15]

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[14] See *United States* v. *Citizens National Trust and Savings Bank*, 166 F. Supp. 410, 412 (S.D. Cal. 1958), aff'd, 270 F.2d 128 (9th Cir. 1959), and *Torquay Corp.* v. *Radio Corp. of America*, 2 F. Supp. 841 (S.D. N.Y. 1932), in which the courts applied the considerations outlined in *Penn General Casualty Co.* to non-*in rem* actions brought by strangers to the first action.

[15] In *Colorado River Water Conservation District* v. *United States*, *supra*, Mr. Justice Stewart, in a dissent joined by Mr. Justice Blackmun and Mr. Justice Stevens, described *Penn General Casualty Co.* and other cases as involving situations where "exclusive control over the subject matter is necessary to effectuate a court's judgment." 424 U.S. at 822. The point, not controverted by the majority in that case, seems particularly pertinent here. Although information is not a tangible object susceptible to physical control, in a very real sense a court's exclusive control over the disposition of that information is necessary to effectuate its judgment in an FOIA or "reverse-FOIA" action. As the court below remarked (A. 72): "Once released pursuant to judicial decree, the data cannot be bottled up within the court's geographical area; with modern communications, information made public at any one point may soon be available throughout the country, often within moments. By the same token, when a court orders an agency to retain information, its edict is absolutely useless unless it stops agency action everywhere."

In any event, whether or not an FOIA or "reverse-FOIA" action technically qualifies as *in rem* or quasi-*in rem*, the considerations identified in *Penn General Casualty Co.* apply generally to decrees that affirmatively direct or limit the defendant's conduct under the compulsion of an injunction and that are quite different from the kind of judgments involved in most of the cases in which subsequent actions by non-parties to an earlier action have been permitted. In the normal case, when a suit by a non-party to a prior action seeks relief that is merely logically inconsistent with the prior judgment, granting relief does not interfere with judicial processes or conflict with the decree of the first court; although the second suit may require relitigation of many of the same issues, a plaintiff's right to his day in court has generally been held to outweigh that burden. See, *e.g.*, *Humphries* v. *Tann*, 487 F.2d 666 (6th Cir. 1973), cert. denied, 416 U.S. 956 (1974).[16]

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[16] Assume, for example, that A sues B for damages because of injuries suffered in an accident and judgment is given to B. C then sues B for injuries sustained in the same

It is quite another story, however, when the second suit seeks relief that would effectively nullify the decree of the first court by ordering the defendant to disobey that decree and thereby risk incurring sanctions for contempt. In such circumstances, policy reasons militate strongly against permitting the second suit to be maintained in another forum and in favor of requiring the non-party to assert his rights in the original forum, either by intervening in the proceeding before judgment or seeking thereafter to modify the decree.

In unusual cases, particular circumstances may warrant a different assessment of the "combination of factors counselling against [the] exercise [of jurisdiction] * * *." *Colorado River Water Conservation District* v. *United States*, *supra*, 424 U.S. at 818-819. The Court need not now wrestle with defining those circumstances, because they plainly are not present here. As noted above, the requesters were well aware of the pendency of the earlier proceedings in the Delaware district court and could have participated in those proceedings with minimal inconvenience; for

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accident, and judgment is given to C. The second judgment may well be logically inconsistent with the first, but it does not jeopardize the validity or the *res judicata* or collateral estoppel effects of the first judgment. Or, in an analogy closer to home, assume that two requesters bring independent FOIA actions in different courts to obtain the same agency record. One might win and one might lose, despite identical claims and defenses, yet neither judgment would nullify the other or would subject the agency to irreconcilable obligations.

tactical reasons they chose not to do so. While the court of appeals has offered a number of justifications in support of its decision (which we discuss below), in the last analysis the court has simply not answered the obvious and intractable problem presented by its judgment: if the litigation it has ordered in the District of Columbia results in a ruling requiring the Commission to disclose the reports, which court should the Commission obey? [17]

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[17] At the end of its opinion, the court of appeals offered the brief suggestion (A. 86) that the District of Columbia district court "might consider enjoining [petitioners] from enforcing their Delaware judgment against the Commission." We know of no authority for the proposition that one federal court may so flagrantly interfere with the judgment of another federal court of equal dignity. Moreover, even if petitioners were "enjoin[ed] * * * from enforcing their Delaware judgment," the Delaware district court would, one supposes, still be empowered to hold the Commission and its members in contempt for violating the court's decree. The cases cited by the court of appeals (A. 86 n.72) provide no support for its suggestion. *Steelman* v. *All Continent Corp.*, 301 U.S. 278 (1937), held only that a court first acquiring jurisdiction may enjoin a party from *seeking* a judgment in a later-filed suit; it did not hold that one court may enjoin the *enforcement* of another court's judgment, much less that the court *subsequently* acquiring jurisdiction may interfere with the decree of a court with prior jurisdiction. *Lapin* v. *Shulton*, *supra*, is directly contrary to the court of appeals' suggestion; *Lapin* squarely held that principles of comity and sound judicial administration preclude one court from modifying or interfering with another court's injunction.

B. *The Interests of FOIA Requesters Do Not Warrant An Exception to The Ordinary Principles of Judicial Comity*

The principal consideration put forward by the court of appeals to justify its decision was its view that the interests and statutory rights of FOIA requesters would not be adequately served if a judgment in favor of submitters in a "reverse-FOIA" case prevented requesters from relitigating the merits of the agency's disclosure obligations in a forum of their own choosing. In support of this conclusion, the court stated or suggested that (1) submitters would have an unfair advantage because they could always file preemptive "reverse-FOIA" suits in "sympathetic" forums that might be inconvenient to the requesters before the requesters had the opportunity to bring suit to vindicate their rights under FOIA (A. 71-72, 84-85); (2) the agency, as defendant in the "reverse-FOIA" suit, is not likely to represent adequately the rights and interests of requesters (A. 74-76); and (3) FOIA represents a legislative policy in favor of having the issue of disclosure litigated in forums convenient to requesters (A. 84-85).

Before addressing each of the court's views separately, some general observations are in order. There is no question that the interplay between FOIA and other federal statutes that allegedly prohibit the disclosure of certain information in furtherance of other important interests (*e.g.*, confidentiality and personal privacy)—as with the interplay between any statutes enacted to further different and potentially conflicting goals—creates problems of judicial administration.

Resolution of those problems necessarily entails burdens and benefits for different classes of litigants in particular cases. In devising a system of procedures to deal with the inevitable conflicts, the general objective should be to minimize the burdens on the judicial system as a whole and to accommodate the systemic interests of litigants without regard to their identity or status.

In the FOIA context, to be sure, when a concrete likelihood arises that an agency will disclose information, an affected person who opposes disclosure and asserts a statutory right to non-disclosure will generally have an opportunity to seek judicial redress before a requester is able to file suit to compel disclosure. But that fact is not peculiar to FOIA litigation; it is a necessary incident of our judicial system. If there is a concrete likelihood that the government will do something to benefit A but injure B—a likelihood sufficient to create a justiciable case or controversy—only B can at that point seek judicial relief.

There is nothing inherently unfair or inappropriate about this basic rule of procedure or about the general rule that the controversy should be litigated in only one court—the court B has chosen—even if its resolution affects A's interests. Numerous procedural devices have been recognized in judicial decisions, statutes, and the Federal Rules of Civil Procedure to reduce the burdens and possibility of unfairness to A—*e.g.*, rules allowing intervention, joinder, interpleader, and transfer of actions. On occasion these devices may not fully equalize the burdens on A and

B, but that is no reason to reject the sound preference for centralizing litigation in one court, the first to assume jurisdiction.

If A were permitted to litigate the same controversy in another court and to obtain a judgment from that court effectively nullifying the judgment of the first, the burden on the judicial system and all affected parties would be substantial. Not only would it result in duplicative, time-consuming and costly litigation and perhaps require the original plaintiffs to defend a multiplicity of suits throughout the country, but also an original plaintiff who had successfully asserted his statutory rights would have no assurance that the judgment in his favor would ever be given effect.

Furthermore, the court of appeals overlooked what seems to us a very significant consideration. Even with respect to disputes over the disclosure of information, the basic rules outlined above do not necessarily operate to the advantage of opponents of disclosure and to the disadvantage of FOIA requesters. For example, when an agency has refused to disclose information sought under FOIA, on the grounds either that a statute prohibits disclosure or that the document is exempt under the Act and the agency has decided to withhold it as a matter of discretion, it is the requester who has the first opportunity to seek judicial relief in the forum of his own choice. If the rules announced by the court below were applied neutrally to both requesters and submitters—and it is difficult to argue otherwise—sub-

mitters should then be able to file "reverse-FOIA" actions in courts viewed as convenient or favorable to them, despite the earlier institution of the FOIA action. This presumably would require the requester to intervene in the "reverse-FOIA" action or to join "all possible submitters" in his FOIA suit, in order to prevent a judgment in his favor from becoming nugatory.

In short, important considerations of judicial administration and fairness support the general rule, in this context as well as others, that a controversy be litigated in the court first acquiring jurisdiction and that persons whose interests may be affected by that litigation be required to assert those interests in that forum.[18]

[18] The court of appeals' conclusion may have rested on the assumption that this rule would create burdens on the "typical" FOIA requester (who may be thought of as representing the "public interest") that are extraordinary or contrary to legislative policy and that duplicative litigation would not be unduly onerous to the "typical" "reverse-FOIA" plaintiff (who may be thought of as a large corporation with ample resources). But general rules of procedure cannot fairly be devised on the basis of the identities of the parties in a particular case or the presumed characteristics of the parties in the typical case. Moreover, there is no reason why a court's assumptions about "typical" litigants or legislative policy should lead to special rules favoring FOIA requesters. As the court below itself recognized (see A. 70 n.27 (collecting cases)), in many cases FOIA requesters are large corporations or associations seeking information for commercial purposes, and the opponents of disclosure are individual citizens claiming an infringement of their rights under the Privacy Act of 1974, 5 U.S.C. 552a, or some other federal statute. There is no basis to conclude that Congress intended the interests protected by non-disclosure statutes to be sub-

Turning more specifically to the views expressed by the court of appeals, we believe there is no basis for the suggestion that duplicative litigation in courts of the requesters' choosing is warranted by the possibility that the courts picked by "reverse-FOIA" plaintiffs may be "sympathetic" to the latter (A. 84). In the first place, courts selected by requesters may be equally "sympathetic" to their claims, and (as we have already noted (see note 18, *supra*)), there is no principled justification for preferring one group of plaintiffs asserting statutory rights over another. More important, however, it is of questionable propriety to adopt procedural rules of general applicability on the basis of assumed sympathies on the part of federal district courts. As this Court remarked in *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, *supra*, 342 U.S. at 185, in squarely rejecting the same argument: "Such apprehension implies a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure."

Similarly, there is no merit to the court's assertion (A. 75-76) that duplicative litigation in another forum is justified because the agency defending the "reverse-FOIA" suit will not adequately represent the disclosure interests of requesters and, indeed, may have an institutional interest in non-disclosure (A. 75 & n.40). First, even assuming that the agency's interest in resisting a "reverse-FOIA" suit may be

ordinate to the disclosure policies of the FOIA. Indeed, as we discuss in the text, pages 38-39, *infra*, in light of Exemption 3 of the FOIA (5 U.S.C. 552(b)(3)) if any conclusion is to be drawn it would be to the contrary.

less substantial than that of the requesters—an assumption that undoubtedly is sometimes true, but certainly is not always true—that is no reason for allowing parallel litigation in another forum, since requesters can always represent their own interests by intervening in the "reverse-FOIA" suit. Second, there is no factual support for the court's concern that the agency will not have a significant interest in resisting a "reverse-FOIA" suit. Such a suit may be maintained only when there is a solid basis for concluding that the agency is about to disclose certain information notwithstanding the submitters' objections; otherwise there would be no case or controversy, or at the very least the dispute would not be ripe for adjudication.[19] Third, there surely are no grounds in *this* case for concluding that the Commission has not vigorously defended its disclosure decision. The Commission argued in the Delaware district court that release of the television accident reports would not violate the Consumer Product Safety Act, and it took an appeal when the district court rejected its position. Although the Third Circuit also disagreed with the Commission (*GTE Sylvania, Inc.* v. *CPSC*, *supra*), the Second Circuit (at the

[19] See, *e.g.*, *Charles River Park "A", Inc.* v. *HUD*, 519 F.2d 935 (D.C. Cir. 1975). If, in fact, the "reverse-FOIA" suit is collusive and the agency has merely pretended to want to disclose the records in order to secure a judgment ratifying its true intention to withhold, such collusion would negate the jurisdiction of the "reverse-FOIA" court and, if subsequently proved, would be grounds for that court or another court to disregard or set aside the judgment. It has never been suggested that the submitters' suits in Delaware are collusive, and such a suggestion would be frivolous.

Commission's urging) has reached a contrary result in regard to the same legal issue. *Pierce & Stevens Chemical Corp.* v. *CPSC*, 585 F.2d 1382 (1978).[20] Hence, there is no evidence to support the District of Columbia Circuit's claim that the Commission has been "less than vigilant in espousing its putative view that the requested documents should be disclosed" (A. 48).

Finally, the court of appeals is incorrect in concluding (A. 84-85) that FOIA reflects a legislative policy favoring venue in forums favorable to FOIA requesters in controversies concerning disclosure of agency records. The FOIA specifies a number of proper venues in suits brought by requesters seeking to compel agency disclosure,[21] but "reverse-FOIA" suits rely on other statutes—in this case the Consumer Product Safety Act and the Administrative Procedure Act—allegedly prohibiting disclosure. See *Chrysler Corp.* v. *Brown, supra.*[22] Venue for actions based on

[20] The Commission has been authorized by the Solicitor General to file a petition for a writ of certiorari to review the decision of the Third Circuit in order to resolve this conflict.

[21] 5 U.S.C. 552(a)(4)(B) allows FOIA suits to be brought in the district court "in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia * * *."

[22] *Chrysler Corp.* held that FOIA itself provides no legal authority for actions seeking to prohibit the disclosure of information and that such actions must be based on some other statute prohibiting disclosure. See note 3, *supra.* Although petitioners' complaints in the Delaware district court relied in part on FOIA, they also relied on other

such statutes includes the district in which the plaintiff resides. 28 U.S.C. 1391(e). Nothing in these statutes or their legislative histories leads to the conclusion that Congress intended the general disclosure policies of FOIA (and the venue provisions pertinent to it) to override the policies reflected in specific nondisclosure statutes (and the venue provisions pertinent to them). Indeed, because FOIA exempts from mandatory release matters that are "specifically exempted from disclosure by [another] statute" (5 U.S.C. 552(b)(3)), when the FOIA and a nondisclosure law collide it would appear that the paramount and controlling legislative policy is against disclosure.

C. *The Possible Availability of Procedural Devices to the Parties in the Delaware Proceedings Does Not Justify Duplicative and Potentially Conflicting Litigation in the District of Columbia*

Although the court of appeals conceded that its decision might "subject [the Commission] to the possibility of inconsistent judgments" and might render the Delaware judgment "nugatory" (A. 79), it concluded that those consequences were warranted because the parties in the Delaware action might have avoided them if, "with some creativity" (A. 80), they

statutes, and the Third Circuit upheld the injunction prohibiting disclosure of the accident reports on the basis of one of those statutes, Section 6(b) of the Consumer Product Safety Act, 15 U.S.C. 2055(b). Although we believe that the Third Circuit erred in its construction of Section 6(b), *Chrysler* does not foreclose petitioners' reliance on that statute.

had invoked available procedural devices to bring all interested persons into one forum. Thus, the court suggested that "[t]he manufacturer-plaintiffs could have named appellant requesters as defendants in the Delaware lawsuit, or they could have maintained it as a defendant class action against the Commission and all possible requesters" (A. 79). The court also suggested that the Commission might have filed an interpleader counterclaim against all possible requesters under Fed. R. Civ. P. 22 (A. 80). It relied most heavily, however, on the contention that petitioners or the Commission should have sought to join the requesters in the Delaware proceedings under Fed. R. Civ. P. 19. Indeed, the court volunteered the view that it was improper for the Delaware district court to have proceeded in the absence of the assertedly "indispensable" requesters—a view that the Third Circuit subsequently rejected in its affirmance of the Delaware judgment. *GTE Sylvania, Inc.* v. *CPSC*, *supra*, slip op. 18-22.

The court of appeals' reasoning is somewhat puzzling. In light of the fact that the requesters assiduously avoided appearing as parties in the Delaware proceeding (although they filed a brief as amici curiae in the Third Circuit), it is difficult to see why the failure of the submitters or the Commission to attempt to bring them unwillingly into that forum should redound to the requesters' benefit by permitting them to litigate their claims in another forum and by compelling the submitters to appear in that forum (or any other forum in which a future requester may bring suit) in order to prevent the Dela-

ware judgment in their favor from becoming worthless. But even putting this objection aside, the court of appeals' creative proposals are unpersuasive as support for its judgment.

To begin with, the possible availability of some or all of the procedural devices suggested by the court is irrelevant to the requesters' right to maintain their FOIA suit against the Commission in the District of Columbia. The failure of the parties in Delaware to invoke those devices has no effect on the validity of the Delaware injunction, which the Commission is compelled to obey even if it disagrees with the order on the merits and even if it agrees with the court of appeals that the Delaware action should have been dismissed under Rule 19(b) in the absence of the requesters. As we have argued above (see pages 15-18, *supra*), withholding agency records in compliance with that injunction is not "improper" within the meaning of Section 552(a)(4)(B). Moreover, the question whether the litigants in Delaware should have resorted to the specific procedural remedies identified by the court below in order to protect the interests of non-parties is a matter properly to be decided by the courts directly involved in and most familiar with that litigation—*i.e.*, the district court in Delaware and the Third Circuit (and ultimately this Court) on review.

Second, while the devices suggested by the court of appeals may be appropriate in some cases to resolve economically and fairly the interests of all persons affected by a controversy—and may even have been possible to use in this case—there are obvious prob-

lems and countervailing considerations that the court failed to address. For example, even if the manufacturers had named the requesters as defendants in the Delaware actions, it is difficult to imagine what relief could have been sought against them, since it was the Commission alone that had the information and was about to disclose it. And it is even more difficult to see how an action naming as a defendant class "all those who likely may subsequently make such requests" or "all possible requesters" (A. 79) would conform to the requirements of Fed. R. Civ. P. 23 concerning, *inter alia*, notice to and description of the members of the class. See Rule 23(c)(2), (c)(3), (d) and (e). Cf. *Indianapolis School Commissioners* v. *Jacobs*, 420 U.S. 128, 130 (1975).

With respect to the court's principal argument, concerning joinder of requesters under Rule 19, joinder of at least known requesters may be feasible in some cases, but it may be inappropriate or impossible in others. Venue over known requesters may be improper or inconvenient in the forum in which the "reverse-FOIA" action was brought, and transfer of that action to the district in which the joined parties reside may be inconvenient or unfair to the plaintiff who instituted the suit. See 28 U.S.C. 1391(c) and 1404(a).[23]

Furthermore, in some cases Rule 19 may not be applicable to persons who have simply requested in-

[23] In this case, the requesters' resistance to appear in Delaware certainly supported a reasonable inference that that forum was inconvenient to them. Indeed, they argued as much as amici in the Third Circuit. See *GTE Sylvania, Inc.* v. *CPSC, supra*, slip op. 21.

formation from an agency. Rule 19 refers in pertinent part to a person who:

> claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

A person who has done nothing more than request agency records may not be claiming a legally protected interest in disclosure under FOIA. Or his claim (or his interest in the subject matter) may be so clearly insubstantial as to make it unlikely that he would ever assert it judicially.[24]

Finally, even if a requester should have been joined under Rule 19 in a "reverse-FOIA" suit because he may be "regarded as indispensable" (Rule 19(b)), the failure to join the requester authorizes but does not require the district court to dismiss the action.

[24] Here, to be sure, the requesters' interest is substantial, and they eventually filed their own action, but the court of appeals has announced a general rule regarding the propriety of joining known requesters under Rule 19 in all future "reverse-FOIA" cases. Requesters as yet unknown, of course, cannot in any event be joined, and therefore Rule 19 could never fully protect federal agencies or "reverse-FOIA" plaintiffs from the burdens of duplicative litigation and inconsistent judgments if the court of appeals' conclusions were adopted.

In deciding whether to dismiss for non-joinder, district courts are directed by Rule 19(b) to consider:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In this case, the Third Circuit concluded that these considerations, and particularly the prejudice to petitioners if the Delaware action were to be dismissed, did not warrant dismissal of the action. *GTE Sylvania, Inc.* v. *CPSC, supra*, slip op. 20-22. We fully agree with that conclusion. Even if we were incorrect, however, there is no basis for the District of Columbia Circuit's general view that joinder of known requesters is required in every "reverse-FOIA" action or for its conclusion in this case that a second FOIA court is free to adjudicate the identical controversy, without regard to the obvious and serious dangers inherent in that course, whenever it concludes that the "reverse-FOIA" court should either have joined certain non-parties or dismissed the action before it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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